GUIDE TO NEW YORK EVIDENCE

ARTICLE 4: RELEVANCE AND ITS LIMITS

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4.01. Relevant Evidence

(1) Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without the evidence.

(2) All relevant evidence is admissible except as otherwise provided or required by the Constitution of the United States or the Constitution, statutes, or common law of New York State.

Note

Subdivision (1). Subdivision (1) defines the term "relevant evidence." It is derived from *People v Davis* (43 NY2d 17, 27 [1977]). As observed by the Court of Appeals, under this definition the evidence must tend to prove a fact that is material in the litigation. (*People v Stevens*, 76 NY2d 833, 835 [1990] [Evidence "should not be admitted unless relevant to a material fact to be proved at trial"]; *People v Scarola*, 71 NY2d 769, 777 [1988] ["Evidence is relevant if it has any tendency in reason to prove the existence of any material fact"]; *People v Yazum*, 13 NY2d 302, 304 [1963] ["all that is necessary is that the evidence have relevance, that it tend to convince that the fact sought to be established is so. That it is equivocal or that it is consistent with suppositions other than guilt does not render it inadmissible"].)

Subdivision (2). Subdivision (2) is derived from *Ando v Woodberry* (8 NY2d 165, 167 [1960] ["(I)t is well to recall the principle, basic to our law of evidence, that '(a)ll facts having rational probative value are admissible' unless there is sound reason to exclude them, unless, that is, 'some specific rule forbids' (1 Wigmore, Evidence [3d ed., 1940], p. 293). It is this general principle which gives rationality, coherence and justification to our system of evidence and we may neglect it only at the risk of turning that system into a trackless morass of arbitrary and artificial rules"]). The Court of Appeals has repeatedly referred to this "principle." (*E.g. Scarola*, 71 NY2d at 777 ["In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule"]; *People v Alvino*, 71 NY2d 233, 241 [1987]; *People v Lewis*, 69 NY2d 321, 325 [1987].)

4.03. Completing and Explaining Writing, Recording, Conversation or Transaction

When part of a writing, conversation, recorded statement or testimony, or evidence of part of a transaction is admitted, any other part of that writing, conversation, recorded statement or testimony, or evidence of any other part of the transaction, may be admitted when necessary to complete, explain, or clarify the previously admitted part. The timing of the admission of such additional parts is subject to the court's discretion.

Note

This rule is derived from long-standing Court of Appeals precedent which recognizes that when evidence has been admitted, an adverse party may offer evidence necessary to complete, explain, or clarify the evidence that has been introduced. (*See e.g. Rouse v Whited*, 25 NY 170, 174-175 [1862] [" 'Where a statement, forming part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible' " (citing *Prince v Samo*, 7 Adol & Ellis 627 [1838]; 1 Phillips' Evidence 416 [4th Am ed, from 10th Eng ed])]; *Grattan v Metropolitan Life Ins. Co.*, 92 NY 274, 284 [1883] ["The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder as tends to explain or qualify what has been received and that is to be deemed a qualification which rebuts and destroys the inference to be derived from or the use to be made of the portion put in evidence"]; *Nay v Curley*, 113 NY 575, 578-579 [1889] ["where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed"].) The rule is founded upon "the plainest principles of equity." (*Rouse*, 25 NY at 177 ["All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of equity require, that if one of the statements is to be used against the party, all the other statements tending to explain it or to qualify this use, should be shown and considered in connection with it"].)

The rule as stated reflects the limits on "completeness" imposed by the Court of Appeals, namely, "(*a*) No utterance irrelevant to the issue is receivable; (*b*) no more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable; (*c*) the remainder thus received merely

aids in the construction of the utterance as a whole, and is not in itself testimony." (*People v Schlessel*, 196 NY 476, 481 [1909].)

Under the rule, when part of a party's own statement is admitted against that party as an admission against the party's interest, the party may offer into evidence any part of the statement which is exculpatory. (*See e.g. People v Dlugash*, 41 NY2d 725, 736 [1977]; *People v Gallo*, 12 NY2d 12, 15-16 [1962]; *Grattan*, 92 NY at 284-286].) Similarly, when a witness has been impeached by a statement the witness previously made, other parts of the statement may be admitted to clarify or explain the statement. (*See e.g. People v Ochoa*, 14 NY3d 180, 187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 496-498 [1973]; *see also People v Ramos*, 70 NY2d 639, 640-641 [1987] [Court emphasized that parts of the statement used for impeachment purposes that concerned unrelated matters were not admissible].) This rule of "completeness" does not in any way modify rule 8.05 (Admission by Adopted Statement) as it relates to a defendant's silence.

The rule also addresses a timing issue; that is, when the completion evidence may be admitted. The rule commits the timing determination to the discretion of the court. (*See e.g. People v Torre*, 42 NY2d 1036, 1037 [1977] [where part is admitted during cross-examination, other parts may be admitted on re-direct]; *Gallo*, 12 NY2d at 15-16 [where part of a written statement was read into the record on the People's rebuttal, other parts which were exculpatory may be admitted at that time].)

While other jurisdictions' codification of the completeness rule permits the use of other writings or recordings for explanatory and clarification purposes of the admitted writing or recording (*see e.g.* Fed Rules Evid rule 106), the Court of Appeals has not addressed the use of other writings or recordings.

It should also be noted that the rule of completeness has been expressly incorporated by the legislature in CPLR 3117 (b) ("If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read") and in CPLR 4517 (b) ("If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read").

4.05. Conditional Relevance (Evidence Offered "Subject to Connection")

When the admissibility of offered evidence depends on the introduction of further evidence to fulfill the requirements of admissibility, the court may admit the offered evidence after, or subject to, receipt of that further evidence. Upon failure of a party to fulfill the requirements of further evidence, the offered evidence must be struck and the jury instructed to disregard it, or, if undue prejudice has resulted, the court may grant a mistrial.

Note

This rule governs the situation where the relevance of offered evidence depends upon the existence of an additional fact(s). It is derived from Court of Appeals precedent that in such a situation the court may admit the evidence "subject to connection"—later proof of that additional fact(s)—or require before admitting the evidence proof of that additional fact(s). (*See e.g. People v Caban*, 5 NY3d 143, 151 [2005]; *Cover v Cohen*, 61 NY2d 261, 269 n 2 [1984].) The order of proof is within the discretion of the court. (*See e.g. Caban*, 5 NY3d at 151.) However, the Court has cautioned that where the evidence is highly prejudicial in content, the "better practice would be for relevance to be established prior to admission, out of the presence of the jury." (*Cover*, 61 NY2d at 269 n 2.) The second sentence sets forth judicial options when the promised connection does not occur. (*See People v Stone,* 29 NY3d 166, 171 [2017]; *United States Vinegar Co. v Schlegel,* 143 NY 537, 544 [1894].)

4.07. Exclusion of Relevant Evidence

A court may exclude relevant evidence if its probative value is outweighed by the danger that its admission would:

(1) create undue prejudice to a party;

(2) confuse the issues and mislead the jury;

(3) prolong the proceeding to an unreasonable extent without any corresponding advantage to the offering party; or

(4) unfairly surprise a party and no remedy other than exclusion could cure the prejudice caused by the surprise.

Note

The Court of Appeals has held that relevant evidence is admissible as set forth in rule 1.05. The Court of Appeals, however, has also made clear that relevant evidence may be excluded by the trial court in the exercise of its discretion upon a consideration of pragmatic factors. (*See generally People v Davis*, 43 NY2d 17, 27 [1977].) These factors are set forth in subdivisions (1) – (4).

Relevant evidence may be excluded when, for example, it:

- causes undue prejudice (*see Mazella v Beals*, 27 NY3d 694, 710 [2016] [in a medical malpractice action, "any possible relevance of the consent order's contents (concerning defendant's negligent treatment of other patients) was outweighed by the obvious undue prejudice of his repeated violations of accepted medical standards"]; *People v Hudy*, 73 NY2d 40, 68 [1988]; *Davis*, 43 NY2d at 27);

- confuses the issues and misleads the jury (*see People v Santarelli*, 49 NY2d 242, 250 [1980] [in insanity cases where a mass of evidence of prior criminal conduct is offered, "the danger is particularly great that the jury will become confused by the mass of evidence presented and will decide to convict the defendant not because they find he was legally sane at the time of the act, but rather because they are convinced that he

is a person of general criminal bent"]; *Radosh v Shipstad*, 20 NY2d 504, 508 [1967]; *People v Nitzberg*, 287 NY 183, 189 [1941]);

- creates unreasonable delay or is unnecessarily cumulative (*see People v Petty*, 7 NY3d 277, 286-287 [2006] [court properly exercised its discretion in excluding a witness' testimony as to threats the victim made against the defendant as four defense witnesses, including the defendant, had already testified that victim made numerous threats against defendant]; *Hudy*, 73 NY2d at 67 ["Where the facts underlying a witness's reason to fabricate are admitted by the witness, extrinsic proof of those facts may properly be excluded, in the court's discretion, on the ground that it would be cumulative"]; *Davis*, 43 NY2d at 27 [court properly excluded the testimony as its "probative value . . . could be outweighed by dangers that the main issue would be obscured, by prolongation of trial"]; *People v Harris*, 209 NY 70, 82 [1913] [court excluded evidence "tending to obscure the main issue in the minds of the jury, to lead them away from the principal matters which require their attention and to protract trials to an unreasonable extent without any corresponding advantage to any one concerned"]); or

- unfairly surprises the opposing party (*Davis*, 43 NY2d at 27; *Nitzberg*, 287 NY at 189).

The Court of Appeals has stressed that these concerns and their presence in a given case do not mandate exclusion of offered evidence; rather, these concerns must be balanced against the probative value of the evidence (*see People v Brewer*, 28 NY3d 272, 277 [2016]; *Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990]).

While the Court of Appeals has consistently enumerated the factors that may lead to a discretionary exclusion of relevant and otherwise admissible evidence, the Court has described the standard in differing ways. The majority, and most recent, of the Court's decisions state that relevant evidence may be excluded if its probative value is "outweighed" by one of the enumerated factors. (*People v Brewer*, 28 NY3d 271, 277 [2016]; *Mazella*, 27 NY3d at 709; *People v Smith*, 27 NY3d 652, 668 [2016]; *People v DiPippo*, 27 NY3d 127, 135-136 [2016]; *Hudy*, 73 NY2d at 68; *Davis*, 43 NY2d at 27.) Other decisions have stated that the probative value must be "substantially outweighed" by one of the enumerated concerns. (*E.g. People v Caban*, 14 NY3d 369, 374 [2010]; *People v Scarola*, 71 NY2d 769, 777 [1988]; *People v Santarelli*, 49 NY2d 241, 255 [1980].) No decision discusses the difference between "outweighed" and "substantially outweighed." An analysis of the decisions suggests that the same result would have been reached regardless of the formulation utilized. A fair assumption, therefore, is that the differing formulations do not affect the required balance between probative value

and prejudice. The rule utilizes the formulation found in the majority of the Court's opinions.

The Court of Appeals has cautioned that exclusion under the rule may not be required when a cautionary instruction to the jury can obviate the potential for prejudice. (*See People v Mountain*, 66 NY2d 197, 203 [1985].) Decisional law, however, recognizes that in some situations a limiting instruction may not be sufficient to protect a party adequately from the jury's misuse of the evidence, and that in such situations the court may take other action, such as precluding or redacting the evidence or directing a severance. (*Bruton v United States*, 391 US 123, 135 [1968] ["(T)here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored"]; *People v Johnson*, 27 NY3d 60, 70 [2016] ["curative instructions could not avoid the substantial risk" that the jury would misuse the evidence]; *People v Cedeno*, 27 NY3d 110, 120 [2016] [redaction as made was not effective to preclude misuse of the evidence by the jury]; *Cover v Cohen*, 61 NY2d 261, 270 [1984] [evidence should be excluded where there is "substantial risk that such evidence may be over-emphasized by the jury"].)

4.09. Restricted Admissibility of Relevant Evidence

(1) Evidence may be admitted for one purpose but not for another, or as to one party but not as to another.

(2) In a trial by jury, the court shall provide an instruction on the scope of the evidence to the jury, as may be necessary or required by request of a party or by statute or decisional law.

Note

Subdivision (1). This rule is derived from Court of Appeals precedent holding that evidence is admissible as to any party or for any relevant purpose even though it may be inadmissible as to another party or for another purpose. In such circumstances, jury instructions as to the limited purpose for which the evidence may be considered are appropriate. (*Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990] [limited purpose]; *People v Williams*, 50 NY2d 996, 998 [1980] [limited purpose]; *People v Marshall*, 306 NY 223, 227 [1954] [admissible as to one defendant but not a codefendant].)

Subdivision (2). The request for a limiting instruction may be made when the evidence is admitted and at the close of trial for inclusion in the court's charge to the jury. (*Williams*, 50 NY2d at 998.)

4.11. Character Evidence

(1) Admissibility. Evidence of a person's character is not admissible to prove that the person acted in conformity therewith on a particular occasion except:

(a) In a civil or criminal proceeding, evidence of a person's character is admissible where that character is an essential element of a crime, charge, claim, or defense.

(b) In a criminal proceeding, a defendant may offer evidence of character that is relevant to prove the defendant acted in conformity therewith on a particular occasion, and, if the evidence is admitted, the People may rebut that evidence.

(c) In a criminal proceeding where the defendant interposes a defense of justification based on the defense of self or another: (i) evidence of the victim's reputation for violence and prior specific acts of violence by the victim against the defendant or others, if known to the defendant and reasonably related to the crime charged, is admissible on the issue of the defendant's belief of the necessity of defending himself or herself or another person from impending harm. Such evidence is not admissible to prove that the defendant was the "initial aggressor"; (ii) evidence of the victim's prior threats against the defendant, whether known to the defendant or not, is admissible to prove that the victim was the initial aggressor.

(d) In a civil or criminal proceeding, evidence of the character of a witness may be admissible to impeach the witness as provided in article six.

(2) Method of Proof. When evidence of a person's character is admissible, proof thereof may only be by testimony as to that person's reputation for the relevant character as set forth in rule 8.30 (1), except:

(a) If evidence of character is admissible under subdivision (1) (a) of this rule, the relevant character may be proved by testimony as to that person's reputation for the relevant character as set forth in rule 8.30 (1) and by proof of relevant specific acts.

(b) If a defendant in a criminal proceeding, through the testimony of a witness called by the defendant, offers evidence of his good character, the People may independently prove any previous conviction of the defendant for an offense that would tend to negate any character trait or quality attributed to the defendant in that witness' testimony.

(3) Cross-Examination. If a witness offers reputation evidence as to a person's character, that witness may be asked on cross-examination whether the witness has heard that the person has been convicted of a crime or engaged in conduct, other than the crime(s) or conduct with which the defendant is charged, that is inconsistent with that reputation.

Note

Subdivision (1). The general rule stated in subdivision (1) is derived from Court of Appeals precedent that has long recognized that in civil and criminal proceedings the character or a character trait of a person may not be proved to raise an inference that the person acted in conformity therewith on the occasion in issue. (*See e.g. People v Zackowitz*, 254 NY 192, 197 [1930]; *Noonan v Luther*, 206 NY 105, 108 [1912]; *McKane v Howard,* 202 NY 181, 186-187 [1911].) In the words of the Court of Appeals: "This court has declared that '[i]nflexibly the law has set its face against the endeavor to fasten guilt upon [a defendant] by proof of character or experience predisposing to an act of crime . . . The endeavor has been often made, but always it has failed.' " (*People v Mullin*, 41 NY2d 475, 479 [1977].) This exclusionary rule is "one, not of logic, but of policy." (*Zackowitz*, 254 NY at 198.)

Evidence of a rape victim's prior sexual conduct to prove conduct, e.g., consent, is governed by CPL 60.42; and evidence of a victim's sexual conduct in prosecutions for any offense is governed by CPL 60.43.

The remaining paragraphs of subdivision (1) set forth the exceptions to the rule's bar to character evidence.

Subdivision (1) (a). Paragraph (a) of subdivision (1) sets forth the common-law rule that where the character or a trait of character of a person is, as a matter of substantive law, an essential element of a crime, charge, claim, or defense, that character or trait of character may be proved. (*See e.g. People v Mann*, 31 NY2d 253 [1972]; *Park v New York Cent. & Hudson Riv. R.R. Co.*, 155 NY 215, 219 [1898]; *Cleghorn v New York Cent. & Hudson Riv. R.R. Co.*, 56 NY 44, 46-47 [1874].)

Subdivision (1) (b). Paragraph (b) of subdivision (1) is derived from Court of Appeals precedent which gives a defendant in a criminal proceeding the option to introduce reputation evidence as to defendant's own good character for the purpose of raising an inference that defendant would not be likely to commit the crime charged. (*See e.g. People v Aharonowicz*, 71 NY2d 678, 681 [1988] ["The principle has long been that in a criminal prosecution, the accused may introduce evidence as to his own good character to show that it is unlikely that he committed the particular offense charged"]; *People v Van Gaasbeck,* 189 NY 408, 413-414 [1907].) When the defendant opts to introduce evidence of good character, "such testimony must relate to the traits involved in the charge against him." (*People v Miller*, 35 NY2d 65, 68 [1974].)

Additionally, the rule as stated recognizes that when the defendant puts his or her character in issue, the People may, in rebuttal, challenge the "good" character or character trait elicited by defendant. (*See e.g. People v Richardson*, 222 NY 103, 107 [1917]; *People v Hinksman*, 192 NY 421, 430-431 [1908].)

Subdivision (1) (c). Paragraph (c) of subdivision (1) is derived from Court of Appeals decisions that when the defendant interposes a justification defense of self-defense, evidence of the victim's *reputation* for being a violent person and evidence of the victim's prior violent acts against others, when known to the defendant, are admissible to show the defendant's state of mind as to the necessity of defending himself or herself (*People v Rodawald*, 177 NY 408, 423 [1904]); and further, that evidence of the victim's past violent *acts* against others, when known to the defendant, is admissible as to the reasonableness of defendant's conduct, provided the evidence is reasonably related to the crime charged (*see e.g. Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Miller*, 39 NY2d 543, 551-552 [1976]).

On the question of who was the "initial aggressor," *People v Petty* (7 NY3d 277 [2006]) permits evidence of the victim's threats against the defendant, whether

the defendant was aware of the threats or not. That evidence permits an inference of the victim's "intent" to "act upon [the uttered threats]" and that he or she did so as the initial aggressor (*id.* at 285).

Subdivision (1) (d) notes that when character evidence is admitted for impeachment purposes, it may be admissible under the rules to be set forth in this Guide's forthcoming article six.

Subdivision (2). This subdivision is derived from the well-established rule in New York that when a person's character or character trait is admissible it must be proved by reputation testimony as set forth in rule 8.30 (1). Reputation testimony is the only form of proof permitted, and that reputation evidence must relate to the trait or traits involved in the charge against the defendant (*see e.g. People v Miller*, 35 NY2d 65, 68 [1974]; *People v Kuss,* 32 NY2d 436, 443 [1973]; *People v Van Gaasbeck*, 189 NY 408, 413-415 [1907]).

The witness may testify, upon an adequate foundation, that "I have heard the reputation for the relevant character or character trait is good," or to the fact that since the witness has never heard anything contrary to the relevant character or character trait, defendant's reputation must be "good." (*Van Gaasbeck*, 189 NY at 420; *see also People v Bouton*, 50 NY2d 130, 140 [1980] ["And, the fact that the offer consisted solely of 'negative evidence'—i.e., the absence of adverse comment on the pertinent aspects of defendant's character—could not in itself be the basis for an exclusionary ruling"].)

The opinions of those who know defendant personally and have firsthand knowledge of defendant's character as well as proof of defendant's commission of specific acts that may implicate the trait are inadmissible (*Van Gaasbeck,* 189 NY at 415-416). The basis for this limitation as stated by the Court of Appeals in *Van Gaasbeck* is that "its admission would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation" (*id.* at 418).

Additionally, the rule as stated in subdivision (2) recognizes that, when the defendant puts his or her character in issue pursuant to subdivision (1) (b), the People may now, in rebuttal, challenge the "good" character or character trait elicited by defendant. As derived from the common law, the People may introduce reputation evidence that defendant's reputation for the relevant character or character trait placed in issue is "bad." (*See e.g. Richardson,* 222 NY at 107; *Hinksman*, 192 NY at 430-431.)

The remaining paragraphs sets forth specific proof rules applicable in limited situations.

Subdivision (2) (a). Paragraph (a) of subdivision (2) is derived from Court of Appeals precedent that, where a person's character is an element of a crime, charge, claim, or defense, the character may be proved by relevant specific acts. (*See e.g. Mann*, 31 NY2d at 259*; Park*, 155 NY at 219; *Cleghorn*, 56 NY at 46-47.) Although the case law is limited, courts have also permitted the character to be proved by reputation. (*See e.g. Wuensch v Morning Journal Assn.,* 4 App Div 110, 115-117 [1st Dept 1896].) However, the Court of Appeals has held to the contrary in an action where the defendant was alleged to have been negligent in hiring or retaining an incompetent employee. (*See Park*, 155 NY at 218-219 ["We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then, that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community"].)

It should also be noted that CPL 60.40 (3) states the rule that where a prior criminal conviction is an element of the charged crime, the prior conviction necessary to the proof of the charged crime may be independently proved unless the defendant has availed himself or herself of the procedural protections set forth in CPL 200.60 or CPL 200.63. (*See* William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, CPL 60.40, at subd three.)

Subdivision (2) (b). Paragraph (b) of subdivision (2) restates CPL 60.40 (2), which provides an additional avenue of proof to rebut the reputation evidence admitted when the defendant puts his or her character in issue pursuant to subdivision (1) (b). (*See* William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, CPL 60.40, at subd two.)

Subdivision (3). This subdivision is derived from Court of Appeals precedent which holds that the witness providing reputation testimony may be asked on cross-examination whether the witness has heard about particular events that are derogatory to the reputation testified to by the witness. (*People v Kuss*, 32 NY2d 436, 443 [1973] ["(I)t is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him"].) Specifically, the witness may only be asked whether the witness heard of the event and not whether the witness has personal knowledge of such an event. (*People v Kennedy*, 47 NY2d 196, 206 [1979] ["Assuming, *arguendo,* that Mrs. Kennedy did indeed serve as a character witness, any impeachment cross-examination should have been limited to her knowledge of defendant's reputation, and should not have extended to her personal knowledge of the underlying acts"].) In *Kuss*, the Court emphasized that there are certain limitations, namely, "[t]he inquiry cannot be used to prove the truth of the rumors, but only to show the ability of the witness to accurately reflect the defendant's reputation in the community. And the prosecutor

must act in good faith; there must be some basis for his questions." (*Kuss*, 32 NY2d at 443.)

And, if the witness is solely a character witness, he or she may not be questioned about the crimes or underlying conduct of the crimes of which the defendant is accused. (*People v Lopez*, 67 AD2d 624, 624 [1st Dept 1979] ["The district attorney also should not have asked defendant's character witness whether he would change his opinion of defendant's character if he heard that defendant had committed a cold-blooded murder, obviously referring to the case on trial. The question improperly assumed that the defendant was guilty of the crime with which he was charged, the very issue toward the determination of which the character evidence was offered"]; *People v Lowery*, 214 AD2d 684, 685 [2d Dept 1995], *mod on other grounds* 88 NY2d 172 [1996] ["We agree with the defendant that the prosecutor's cross-examination of a defense character witness exceeded the bounds of propriety insofar as the prosecutor utilized hypothetical questions which assumed the defendant's guilt of the crimes for which he was on trial"]; *People v Gandy*, 152 AD2d 909, 909 [4th Dept 1989] ["The court erred in permitting the People to cross-examine defendant's character witnesses concerning whether their opinions of defendant's reputation would change if they knew that defendant had committed the crimes at issue"].)

4.13. Habit

Habit of a person or routine practice of an organization is a deliberate and repetitive practice by a person or organization in complete control of the circumstances under which the practice occurs (as opposed to conduct however frequent yet likely to vary from time to time depending on the circumstances). Evidence of a person's habit or an organization's routine practice is admissible to prove that the person or organization acted in conformity with that habit on a particular occasion.

Note

This rule sets forth New York's habit and routine practice rule as established by Court of Appeals decisions.

The definition of habit of a person and regular practice of an organization contained in the first sentence is derived from *Halloran v Virginia Chems.* (41 NY2d 386, 389, 392 [1977] [mechanic's practice of heating cans of Freon before transferring the gas to automobile air conditioning systems constituted admissible habit evidence as proof showed it was "a deliberate and repetitive practice" by a person "in complete control of the circumstances" as opposed to "conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances"]); *Ferrer v Harris* (55 NY2d 285, 294 [1982] [evidence that mother had told her daughter not to cross the street without looking for cars was not admissible as habit evidence because the plaintiff made no showing of "a persistent habit or regular usage by one in control of the circumstances in which it is employed"]); and *Rivera v Anilesh* (8 NY3d 627, 635-636 [2007] [dentist's pre-extraction injection procedure which would not vary from patient to patient constituted admissible habit evidence as the record established it was a " 'deliberate and repetitive practice'—the mundane administration of a local anesthetic prior to a relatively routine tooth extraction—by a trained, experienced professional 'in complete control of the circumstances' "]).

The rule's second sentence, as derived from several Court of Appeals decisions, provides that evidence of a person's habit or an organization's routine practice is admissible to prove that the habit or routine practice was followed on the occasion in issue. (*E.g. Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508-509 [2015] [billing company's regular office practices and procedures in handling no-fault claims to prove claims had been mailed]; *Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 392; *Beakes v DaCunha*, 126 NY 293, 298 [1891] [habit of being home on a specific day of the month to transact a specified

business]; *Matter of Kellum*, 52 NY 517, 519-520 [1873] [attorney's routine practice regarding execution of wills to prove proper execution of will].) As stated by the Court in *Halloran*: "[E]vidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions" because "one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again" (41 NY2d at 391).

Of note, the Court of Appeals initially appeared disinclined to accept habit evidence in negligence cases. (*See Eppendorf v Brooklyn City & Newton R.R. Co.*, 69 NY 195, 197 [1877] [evidence of a plaintiff's habit of jumping on streetcars was not admissible to prove he was negligent on the day of the accident]; *Zucker v Whitridge*, 205 NY 50, 58-66 [1912] [proof that the deceased had usually looked both ways before crossing railroad tracks was not admissible to establish his care on the particular occasion].) *Halloran*, however, found that a "statement that evidence of habit or regular usage is never admissible to establish negligence is too broad" (41 NY2d at 392; *see also Ferrer v Harris*, 55 NY2d 285, 294 [1982] [acknowledging that *Halloran* "indicated support for less dogmatic adherence" to the exclusion of habit evidence in negligence cases]).

Rather, as explained in *Halloran*, "[W]here the issue involves proof of a deliberate and repetitive practice, a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence, and hence negligence on a particular occasion. Far less likely to vary with the attendant circumstances, such repetitive conduct is more predictive than the frequency (or rarity) of jumping on streetcars or exercising stop-look-and-listen caution in crossing railroad tracks" (*Halloran*, 41 NY2d at 392 [citations omitted]; *accord Rivera v Anilesh*, 8 NY3d 627 [2007]).

Thus, in *Halloran*, a personal injury products liability action brought by a mechanic who sustained an injury in the use of the product, the Court authorized habit evidence of the plaintiff mechanic's habit in the use of that product which permitted an inference that he was negligent in its use. In *Rivera*, a patient sued her dentist in a malpractice action, and the Court allowed the dentist to offer habit evidence relating to her "routine procedure for administering injections of anesthesia" to show that she had not committed malpractice (8 NY3d at 635).

Before proof of habit or routine practice is admitted, the party offering the proof must "show on *voir dire* . . . that [the party] expects to prove a sufficient number of instances of the conduct in question" (*Halloran*, 41 NY2d at 392). In *Halloran*, for example, "[i]f defendant's witness was prepared to testify to seeing Halloran using an immersion coil [in servicing automobile air conditioner units] on only one occasion, exclusion was proper. If, on the other hand, plaintiff was seen a sufficient number of times, and it is preferable that defendant be able to fix, at least generally, the times and places of such occurrences, a finding of habit or regular usage would be warranted and the evidence admissible for the jury's consideration"

(*id.* at 392-393). And, while at one point decision law was unclear whether habit evidence was admissible only when there were no eyewitnesses to the conduct in issue (*see e.g. Zucker*, 205 NY at 58), recent decisions permit habit evidence regardless of whether eyewitnesses are available (*Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 390-391).

4.15. Liability Insurance

Evidence that a person was or was not insured against liability:

(1) is not admissible to prove that the person acted negligently or otherwise wrongfully or that the person should be held strictly liable, or to establish damages;

(2) is admissible to prove some other fact relevant to a material issue, such as agency, ownership or control over premises where the accident occurred or the instrumentality that caused the accident, or bias or prejudice of a witness.

Note

This rule is derived from well settled New York law governing the admissibility of evidence as to whether a person is or is not insured against liability.

As set forth in subdivision (1), such evidence is inadmissible when offered on the issue of whether an insured acted negligently or otherwise wrongfully or should be held strictly liable. (*See e.g. Salm v Moses*, 13 NY3d 816, 817 [2009] ["(e)vidence that a defendant carries liability insurance is generally inadmissible"]; *Leotta v Plessinger*, 8 NY2d 449, 461 [1960] ["(o)rdinarily whether a defendant has or has not obtained insurance is irrelevant to the issues, and, since highly prejudicial, therefore, inadmissible"]; *Simpson v Foundation Co*., 201 NY 479, 490-491 [1911] [it was improper for plaintiff's counsel to ask questions suggesting to the jury that the defendant was insured in order to induce the jury to give a larger verdict]; *see also Rendo v Schermerhorn*, 24 AD2d 773, 773 [3d Dept 1965] ["we cannot condone the obvious reference to the lack of defendants' insurance coverage contained in defense counsel's summation, a fact which in the circumstances here may very well have engendered sympathy in the jurors' minds"].)

As stated by the Court of Appeals in *Salm*, excluding evidence of insurance coverage on the issue of liability is premised on two reasons:

> "First, 'it might make it much easier to find an adverse verdict if the jury understood that an insurance company would be compelled to pay the verdict.' Second, evidence of liability insurance injects a collateral issue into the trial that is not relevant as to whether the insured acted negligently. Although we have acknowledged that liability insurance has increasingly become more prevalent and that, consequently, jurors are now more likely to be aware of the

> possibility of insurance coverage, we have continued to recognize the potential for prejudice." (*Salm*, 13 NY3d at 817-818 [citations excluded].)

Subdivision (2) recognizes that New York law does not exclude evidence of insurance coverage or lack of insurance when the evidence is offered for a purpose other than to establish liability or fault, such as to establish ownership or control over the premises where the accident occurred or the instrumentality that caused the accident (*see Leotta v Plessinger*, 8 NY2d 449, 462 [1960]), or to show bias or interest on the part of a witness. (*Salm*, 13 NY3d at 818.) The enumeration of potential admissible purposes is illustrative and not exclusive. When such evidence is admissible, however, the Court of Appeals has specifically cautioned that the trial court may exclude the evidence if it determines the risk of confusion or prejudice outweighs its probative value. (*Salm*, 13 NY3d at 818.)

4.16. Offers to Compromise

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages.

Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this rule shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations.

Furthermore, the exclusion established by this rule shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.

Note

This rule is verbatim from CPLR 4547. It governs the admissibility of evidence of compromise and settlement and offers to compromise or settle when offered to prove liability or lack thereof or the amount of damages.

CPLR 4547 was enacted in 1998 (L 1998, ch 317, §1). It tracks in large part the language of the original version of Federal Rules of Evidence rule 408 as the legislative intent was to make New York law consistent with that rule as it then existed (Senate Introducer's Mem in Support, Bill Jacket, L 1998, ch 317 at 4). In 2006, however, Federal Rules of Evidence rule 408 was amended to address issues that had split the federal courts regarding its applicability in criminal trials. The amended rule provides for the admissibility in criminal cases of statements made by a party in discussions regarding the compromise of a civil claim by a government agency acting in its regulatory, investigative, or enforcement capacity. However, Federal Rules of Evidence rule 408 makes evidence of a compromise or offers to

compromise civil litigation inadmissible in criminal actions involving the same facts.

The Court of Appeals has not addressed the issue of the applicability of CPLR 4547 in criminal actions. In *People v Newman* (107 AD3d 827 [1st Dept 2013]), the issue was raised but not resolved. In *Newman*, defendant was convicted of grand larceny in the first degree based on his embezzlement of money from the complainants. He argued that the trial court erred in admitting evidence of the written statement and the payments he made to the complainants as such evidence was barred by CPLR 4547. "Assuming, without deciding, that CPLR 4547 applies to criminal trials," the Court concluded that the statute did not apply because defendant had admitted the embezzlements (*id.* at 828). In *People v Forbes-Haas* (32 Misc 3d 685 [Onondaga County Ct 2011]), a grand larceny in the third degree prosecution based on defendant's alleged wrongful taking and withholding funds from an escrow account at a bank, the trial court allowed the prosecution to introduce into evidence statements made by the defendant during a settlement conference with employees of the bank, and the settlement agreement between the defendant and the bank. The court held that CPLR 4547 was inapplicable in a criminal action because "the public interest in prosecuting crime outweighs achieving a settlement of civil claims" (*id*. at 688).

4.17. Payment by Joint Tortfeasor (CPLR 4533-b)

(1) In an action for personal injury, injury to property or for wrongful death, any proof as to payment by or settlement with another joint tortfeasor, or one claimed to be a joint tortfeasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury.

(2) The fact, but not the amount, of a settlement may, however, form a proper basis for impeachment of a testifying witness.

Note

Subdivision (1) restates verbatim CPLR 4533-b, except for the omission of the last sentence of that statute which reads: "The court shall deduct the proper amount, as determined pursuant to section 15-108 of the general obligations law, from the award made by the jury."

CPLR 4533-b was designed to abrogate decisional law to the extent it was contrary. (*See Livant v Livant*, 18 AD2d 383 [1963], *lv dismissed* 13 NY2d 894 [1963].)

While subdivision (1) prohibits the introduction of evidence of a settlement with a tortfeasor when offered by a defendant in mitigation of damages, the statute does not prohibit, and decisional law allows, as set forth in subdivision (2), the use of such evidence when relevant to impeach a tortfeasor. (*See Maldonado v Cotter*, 256 AD2d 1073, 1075 [4th Dept 1998] [defendants properly cross-examined "the recovery room nurse concerning the fact but not the amount of plaintiff's settlement with the Hospital, pursuant to which that nurse also was released from liability. 'It has long been recognized that a prior settlement might well have an impact upon the credibility of a witness called to testify on behalf of a former adverse party' (*Hill v Arnold*, 226 AD2d 232, 233)"]; *compare Stevens v Atwal*, 30 AD3d 993, 994 [4th Dept 2006] [while recognizing that a prior settlement may be admissible to impeach a witness, held that on the facts of the case, "the settlements had no bearing on plaintiff's credibility"].)

4.18. Payment of Medical and Other Expenses

Evidence of offering, promising, or making payment for medical, hospital, or other expenses, such as lost wages, resulting from an injury is not admissible as proof of liability for the injury, but is admissible to prove some other fact relevant to a material issue, such as agency, or ownership or control of an object or premises, or bias or prejudice of a witness.

Note

This rule is derived from established, albeit sparse, New York law governing the admissibility of evidence of a party's post-injury offer to pay the injured party's medical, hospital or other expenses, such as lost wages.

The first portion of the rule that precludes admissibility of the specified post-injury conduct is derived from *Grogan v Dooley* (211 NY 30 [1914, Cardozo, J.]). In *Grogan*, a personal injury action, the trial court permitted plaintiff to prove the defendant offered to pay his wages and medical expenses while he was disabled, viewing the offer as an admission of liability. The Court of Appeals rejected the ruling, holding the evidence had "no such significance." (*Id.* at 31.) Rather, the defendant's offer "should be treated as a humane recognition of an existing necessity" (*id.* at 32); and "[t]he law would be doing wrong to [persons making such offers] and scant service to [recipients of the offers] if it throttled the impulses of benevolence by distorting humane conduct into a confession of wrongdoing." (*Id.*)

While the rule excludes payment and offers of payment of medical and similar expenses, it does not encompass evidence of statements, e.g., opinions or admissions of fault or liability, when made in connection with the payment or offer. Such statements may, however, be inadmissible under Guide to New York Evidence rule 4.05 (Completing and Explaining Writing, Recording, Conversation or Transaction) when made in the context of settling or compromising a matter in dispute.

No New York case has addressed offers to pay property damage.

New York, however, in the second portion of the rule permits admissibility of the specified post-injury conduct when admissible for a purpose other than establishing liability. (*See e.g. Flieg v Levy*, 148 App Div 781, 783 [2d Dept 1912] [ownership of horse alleged to have struck or kicked plaintiff].) The non-liability purposes enumerated are suggested by *Flieg* and by comparable rules that statements or conduct of a party may not be admissible to establish liability for

reasons of policy, but may be admissible for non-liability purposes where such purposes are relevant.

4.19. Subsequent Remedial Measures

Evidence of measures taken after an event, that, if taken before the event, would have made injury or damage less likely to result:

(1) in civil proceedings, is not admissible when offered to prove negligence or culpable conduct in connection with the event or to prove negligent or culpable conduct with respect to a product alleged to be defective.

(2) in civil and criminal proceedings, is admissible to prove some other fact relevant to a material issue, such as ownership or control of an object or premises, feasibility of precautionary measures, or in a products liability proceeding to prove a manufacturing defect by a change in design.

Note

This rule governs the admissibility in civil proceedings of evidence of repairs or other measures, such as a modification, change, or precaution, taken by a party after an event, such as an accident, which if taken before the event would have made injury or damage less likely to result.

The exclusionary aspect of the rule does not necessarily apply in a criminal proceeding. As explained in *People v Thomas* (70 NY2d 823, 825 [1987]), where the defendant was prosecuted for a homicide arising out of the operation of a motor vehicle:

> "defendant's proof of subsequent design modifications to his automobile offered in support of his defense that the accident was caused, not by his drinking, but by defects in his motor vehicle . . . should have been permitted. . . . Evidence of postaccident design changes is irrelevant in strict liability or negligence cases when offered to prove negligent design. Here, however, the conduct of the manufacturer or seller in designing the vehicle was not at issue. Rather, consistent with his explanation at the scene of the accident, defendant sought only to prove the existence of a 'defect' in his automobile, as part of his defense. Moreover, the policy reasons for not allowing evidence of postaccident repairs or improvements in the civil cases do not apply." (Citations omitted.)

The rule is derived from well settled New York law. (*See e.g. Caprara v Chrysler Corp.*, 52 NY2d 114, 122 [1981]; *Getty v Town of Hamlin*, 127 NY 636, 638 [1891]; *Corcoran v Village of Peekskill*, 108 NY 151, 155 [1888].) The Court of Appeals in *Caprara* stated the rationale for this exclusionary rule:

> "Now reaching the broader and more basic question of the role of postaccident change in this case, we start by reiterating the long accepted proposition that, in a negligence suit, proof of a defendant's postaccident repair or improvement ordinarily is not admissible. The reason for applying this rule of evidence to that kind of case is clear. Since at the heart of such an action is either affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences, proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value." (52 NY2d at 122.)

In strict product liability cases, Court of Appeals decisions make the exclusionary rule applicable in actions based on design defects or failure to warn, but inapplicable in actions based on a manufacturing defect. (*See Haran v Union Carbide Corp.*, 68 NY2d 710, 711-712 [1986] [in a failure to warn action, evidence of a subsequent change in warnings is inadmissible]; *Cover v Cohen*, 61 NY2d 261, 274-275 [1984] [in a *design defect* action, evidence of a subsequent change in design is inadmissible]; *Caprara*, 52 NY2d at 123-126 [in a *manufacturing defect* action, evidence of a subsequent design change is admissible as it tended to show a defect and that it was the cause of the accident].) The rationale for the distinction was explained by Justice Simons in *Rainbow v Elia Bldg. Co.* (79 AD2d 287, 292-293 [4th Dept 1981], *affd on op below* 56 NY2d 550 [1982]):

> "Perhaps it is sufficient to note that in *Caprara* the court limited its decision to strict product liability cases involving manufacturing flaws, holding that the exclusionary rule did not apply to them because due care is not a defense in such cases. Clearly distinguishable under present New York law is a strict products liability claim of design defect, based as it is on a balancing of risk and utility factors, and involving considerations of reasonable care." (Citation omitted.)

Finally, Court of Appeals decisions hold that the exclusionary rule is inapplicable where the evidence of subsequent remedial measures is offered for a non-liability purpose relevant in the action. (*See e.g. Scudero v Campbell*, 288 NY 328 [1942] [ownership]; *Caprara*, 52 NY2d at 122 [in dictum, noting impeachment of a witness would be a permissible purpose]; *Cover*, 61 NY2d at 270; *see also Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549 [2011] ["The records of defendant's post-fire repairs and remedial measures do not fall within any of the recognized exceptions . . . . Contrary to plaintiffs' contentions, 'general credibility

impeachment' is not an exception. Control is not at issue here since defendant concedes that it owns the premises"].)

4.20. Evidence of Complainant's Sexual Conduct or Dress

(1) Admissibility of Evidence of Victim's Sexual Conduct in Sex Offense Cases [CPL 60.42]

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the Penal Law, unless such evidence:

(a) proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or

(b) proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the Penal Law within three years prior to the sex offense which is the subject of the prosecution; or

(c) rebuts evidence introduced by the People of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or

(d) rebuts evidence introduced by the People which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or

(e) is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

(2) Admissibility of Evidence of Victim's Sexual Conduct in Non-Sex Offense Cases [CPL 60.43]

Evidence of the victim's sexual conduct, including the past sexual conduct of a deceased victim, may not be admitted in a prosecution for any offense, attempt to commit an offense or conspiracy to commit an offense defined in the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

(3) Admissibility of Evidence of Victim's Manner of Dress in Sex Offense Cases [CPL 60.48]

Evidence of the manner in which the victim was dressed at the time of the commission of an offense may not be admitted in a prosecution for any offense, or an attempt to commit an offense, defined in article one hundred thirty of the Penal Law, unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

Note

Subdivision (1) restates verbatim CPL 60.42 ("Rules of evidence; admissibility of evidence of victim's sexual conduct in sex offense cases").

CPL 60.42, known as the "rape shield law," was enacted in 1975 (L 1975, ch 230, § 1) to address the "concerns that testimony about the sexual past of the victims of sex crimes often serves solely to harass the victim and confuse the jurors . . . At the same time, by providing exceptions to the general evidentiary prohibition of section 60.42, our Legislature acknowledged that there are instances where evidence of a complainant's sexual history might be relevant and admissible. The

exceptions also recognize that any law circumscribing the ability of the accused to defend against criminal charges remains subject to limitation by constitutional guarantees of due process and the right to confront the prosecution's witnesses." (*People v Williams*, 81 NY2d 303, 312 [1993]; *see Michigan v Lucas*, 500 US 145, 146 [1991]; *see also People v Scott*, 16 NY3d 589, 594 [2011] [evidence of a complainant's sexual conduct "must be precluded if it does not tend to establish a defense to the crime because it will only harass the victim and possibly confuse the jurors"]; *People v Halbert*, 80 NY2d 865 [1992] [example of a court appropriately balancing the prohibition and the defense]; *People v Halter*, 19 NY3d 1046 [2012] [same].)

Subdivision (2) restates verbatim CPL 60.43 ("Rules of evidence; admissibility of evidence of victim's sexual conduct in non-sex offense cases"). It was enacted in 1990 (L 1990, ch 832, § 1) and shares the same concerns as CPL 60.42.

Subdivision (3) restates verbatim CPL 60.48 ("Rules of evidence; admissibility of evidence of victim's manner of dress in sex offense cases"). It was enacted in 1994 (L 1994, ch 482, § 1) and also shares the same purpose as the other subdivisions.

4.21. Evidence of Crimes and Wrongs (*Molineux*)

(1) Evidence of crimes, wrongs, or other acts committed by a person is not admissible to prove that the person acted in conformity therewith on a particular occasion or had a propensity to engage in a wrongful act or acts. This evidence may be admissible when it is more probative than prejudicial to prove, for example:

> **motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or conduct that is inextricably interwoven with the charged acts; or to provide necessary background information or explanation; or to complete the narrative of the subject event or matter.**

(2) In a criminal proceeding, where the defendant interposes a defense, the People on rebuttal may prove the defendant's commission of other crimes or wrongs when such crimes or wrongs are relevant and probative to disprove the defense.

Note

Subdivision (1). This rule sets forth what is generally known as the *Molineux* rule, after the seminal case of *People v Molineux* (168 NY 264 [1901]).

The first sentence sets forth the general rule, applicable in both civil and criminal proceedings, that when evidence of other crimes, wrongs or acts committed by a person is offered for the purpose of raising an inference that the person is likely to have committed the crime charged or the act in issue, the evidence is inadmissible. (*Molineux*, 168 NY at 291-293; *People v Morris*, 21 NY3d 588, 594 [2013] ["(E)vidence of uncharged crimes is inadmissible where its purpose is only to show a defendant's bad character or propensity towards crime"]; *People v Bradley*, 20 NY3d 128, 135 [2012] ["Without some better developed theory of relevance," evidence of a stabbing incident more than 10 years before defendant fatally stabbed her estranged boyfriend was "resonant solely for what (it) seemed to disclose about defendant's violent propensity and the manner of its expression"]; *Matter of Brandon*, 55 NY2d 206, 210-211 [1982] ["A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to

prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion"]; *People v Vargas*, 88 NY2d 856 [1996] [Where only the credibility of the complainant and the credibility of the defendant were at issue on whether there was a forcible or consensual sex act, evidence of the defendant having engaged in sexual misconduct with others was impermissible evidence of propensity, not probative evidence of intent].)

As explained in *People v Frumusa* (29 NY3d 364, 369 [2017]):

> "The *Molineux* rule ' "is based on policy and not on logic." ' 'It may be logical to conclude from a defendant's prior crimes that he is inclined to act criminally, but such evidence "is excluded for policy reasons because it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his past" ' " (citations omitted).

The second sentence sets forth exceptions to the exclusionary rule recognized by the Court of Appeals. The exceptions relate to circumstances where the evidence of other crimes, wrongs, or acts is offered for a non-conformity purpose that is relevant in the proceeding. These exceptions are available in both civil and criminal proceedings. (*See Matter of Brandon*, 55 NY2d at 210-211; *Mazella v Beals*, 27 NY3d 694, 709-710 [2016].)

In *Molineux*, the Court listed examples of uncharged crimes that may be relevant to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant (168 NY at 293). This enumeration is "merely illustrative" (*People v Vails*, 43 NY2d 364, 368 [1977]) and not intended to be "exhaustive" of the possible range of relevancy (*People v Santarelli*, 49 NY2d 241, 248 [1980]). The Court has continued to add to this enumeration. (*See People v Stanard*, 32 NY2d 143, 146 [1973] ["background evidence"]; *People v Cook*, 42 NY2d 204, 208 [1977] [" 'to complete the narrative' "]; *People v Vails*, 43 NY2d 364, 368 [1977].)

Even when evidence of other crimes, wrongs, or acts is admissible for such a non-conformity purpose, the court must weigh the evidence's probative value against its prejudicial impact before admitting the evidence and may exclude the evidence in its discretion. (*See* Guide to NY Evid rule 4.07; *People v Alvino*, 71 NY2d 233, 241-242 [1987]; *People v Ventimiglia*, 52 NY2d 350, 360 [1981].)

In *People v Robinson* (68 NY2d 541, 544-545 [1986]), the Court of Appeals held the People must show by clear and convincing evidence that the defendant committed the other crimes in order to admit evidence under the identity exception.

In its discretion, a trial court may conduct an inquiry or hearing, outside the presence of the jury, to determine admissibility, and in particular whether there is sufficient evidence of the *Molineux* exception. The party against whom the

Molineux evidence is sought to be admitted, however, is not entitled to pretrial notice of the opposing party's intent to offer such evidence, albeit that is the preferred practice. (*Cf.* CPL 240.43 [notice is required of prior uncharged criminal, vicious or immoral acts which a prosecutor intends to use for impeachment].)

Preliminary evidence of a *Molineux* exception may be admitted pursuant to rule 4.05 of the Guide to New York Evidence (Conditional Relevance [Evidence Offered "Subject to Connection"]). (*See People v Small*, 12 NY3d 732, 733 [2009] [mid-trial grant of the People's application to introduce *Molineux* evidence to rebut the defendant's defense was proper]; *People v Ventimiglia*, 52 NY2d 350, 362 [1981] [prior to trial or the testimony of the *Molineux* witness "the prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness"].) Nothing precludes a court from itself requiring a party to advise the court, orally or in writing, of a prospective trial application to admit *Molineux* evidence and conducting any necessary and appropriate proceeding to determine the matter.

It should be noted that in certain instances, a prior criminal conviction or conduct may be required proof of a criminal charge.

In instances where a prior criminal conviction must be proved, statutory law may permit a defendant to admit the prior criminal conviction outside the presence of the jury in order to preclude the People from offering proof of that conviction at trial (CPL 200.60, 200.63). The principles of *Molineux* set forth in this rule may, however, yet permit the People to prove the conviction (*People v Anderson*, 114 AD3d 1083, 1086 [3d Dept 2014]).

In a conspiracy case, an overt act must be alleged and proved to have been committed in furtherance of the conspiracy (Penal Law § 105.20). That overt act may constitute an uncharged crime. And, the Court of Appeals has held that an "indictment for conspiracy need not allege every overt act . . . If the indictment provides sufficient detail about the scope and nature of the conspiracy and the major overt acts committed in furtherance of it, then evidence may be offered at trial of related [non-enumerated] overt acts" (*People v Ribowsky*, 77 NY2d 284, 292-293 [1991] [citations omitted]), even if those overt acts include uncharged crimes (*People v Portis*, 129 AD3d 1300, 1302 [3d Dept 2015]; *People v Snagg*, 35 AD3d 1287, 1288 [4th Dept 2006]; *People v Morales*, 309 AD2d 1065 [3d Dept 2003]; *People v McKnight*, 281 AD2d 293 [1st Dept 2001]). While such overt acts are not subject to exclusion pursuant to the *Molineux* rule, their admissibility, as with all forms of evidence, may be subject to rule 1.07 of the Guide to New York Evidence (Exclusion of Relevant Evidence). It may therefore be advisable and the better practice (as it is for *Molineux* evidence) for a court to require that it be informed before the commencement of trial of any unenumerated overt acts the People intend to prove.

Subdivision (2). The rule in this subdivision is derived from several Court of Appeals decisions which permit evidence of a defendant's commission of other crimes or wrongs to rebut a defense raised by the defendant. (*See e.g. People v Israel*, 26 NY3d 236, 242-243 [2015] [rebuttal of extreme emotional distress disturbance]; *People v Santarelli*, 49 NY2d 241, 248 [1980] [rebuttal of insanity defense]; *People v Calvano*, 30 NY2d 199 [1972] [rebuttal of entrapment defense].)

Notably, in *People v Valentin* (29 NY3d 150 [2017]) where the defendant did not present evidence of an agency defense, but rather interposed the defense based on the People's evidence, the People were entitled to prove the defendant's prior conviction for a drug sale on the issue of his intent to sell.

4.22. Evidence of Destroyed Drugs

(1) The destruction of dangerous drugs, pursuant to the provisions of CPL article 715, shall not preclude the admission on trial or in a proceeding in connection therewith of testimony or evidence where such testimony or evidence would otherwise have been admissible if such drugs had not been destroyed.

(2) Notwithstanding subdivision one, the failure to follow CPL article 715 does not preclude admission of testimony as to the nature and amount of the drugs seized if the prosecution has sufficiently explained the destruction, the drugs were not destroyed in bad faith, and the defendant is not prejudiced.

Note

Subdivision (1) restates verbatim CPL 60.70, except where the statutory language refers to "article seven hundred fifteen hereof," this rule inserts the appropriate reference, namely, "CPL article 715."

Subdivision (2) assumes that the normal prerequisites to the admissibility of drugs, such as chain of custody, can be met but that at some point the drugs themselves have been destroyed. In that instance, *People v Reed* (44 NY2d 799 [1978]) allows for testimony about the drugs if the criteria stated in the rule are fulfilled:

> "[T]he destruction of the contraband by the police custodian was due to a clerical error which led him to reasonably believe that the case had been dismissed. The prosecution has thus sufficiently explained the destruction, and there is no indication and, indeed, no claim of bad faith. Additionally significant is the absence of any prejudice to the defendant as a result of the destruction of the substance prior to trial. . . . [T]he drugs were available to defendant for independent analysis or measurement for nearly two years, and were not destroyed until just prior to trial. At no time during this long period that the police had the substance did defendant seek to have the drugs examined; instead, he simply requested a copy of the police laboratory report. In light of these facts, the decision to allow testimony as to the nature and amount of the material seized did not constitute error" (*Reed* at 800-801).

4.23. Evidence of Alcohol or Drugs in Blood

(1) Upon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two of [the Vehicle and Traffic Law], the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of section eleven hundred ninety-four of [the Vehicle and Traffic Law].

(2) In any prosecution where two or more offenses against the same defendant are properly joined in one indictment or charged in two accusatory instruments properly consolidated for trial purposes and where one such offense charges a violation of any subdivision of section eleven hundred ninety-two of the vehicle and traffic law [Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs], chemical test evidence properly admissible as evidence of intoxication under subdivision one of section eleven hundred ninety-five of such law [Chemical Test Evidence] shall also, if relevant, be received in evidence with regard to the remaining charges in the indictments.

(3) This rule does not preclude the admission in any proceeding of evidence of the amount of alcohol or drugs in a person's blood, if legally obtained and relevant, notwithstanding the absence of any charge under the Vehicle and Traffic Law.

Note

Subdivision (1) restates Vehicle and Traffic Law § 1195 (1) except that the words "the Vehicle and Traffic Law" in brackets are substituted for "of this article." By its terms, it applies to any "action or proceeding," civil or criminal (*People v Ladd*, 89 NY2d 893, 896 [1996]).

Subdivision (2) restates Criminal Procedure Law § 60.75, except for the bracketed material. It applies to a criminal action, but as *Ladd* explains does not preempt application of the rule in subdivision (1):

> "CPL 60.75 provides that when Vehicle and Traffic Law charges and Penal Law charges are tried together the evidence obtained pursuant to section 1194 of the Vehicle and Traffic Law is admissible as to both charges. The statute was enacted to remove any doubts arising from our holding in *People v Moselle* (57 NY2d 97 [1982]), that when charges from the two chapters were joined the test results were not admissible with respect to the Penal Law charges. Section 60.75 does not limit the use of blood test results to prosecutions under the Vehicle and Traffic Law or to prosecutions linking Vehicle and Traffic Law and Penal Law offenses. Indeed, section 1195 (1) of the Vehicle and Traffic Law provides that blood test results are admissible at the trial of 'any action or proceeding' arising out of a factual basis for a driving while intoxicated arrest. The evidence, if legally obtained and relevant, should be admissible in Penal Law prosecutions, notwithstanding the absence of any charge under the Vehicle and Traffic Law" (*Ladd*, 89 NY2d at 896).

Subdivision (3) is derived from the rule on "relevant evidence" (Guide to NY Evid rule 4.01 [2]) and *Ladd* (89 NY2d at 896).

4.24. Identification of a Defendant

Part I. Definition of blind or blinded procedure [CPL 60.25 (1) (C)]

For purposes of this section, a "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproduction under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness.

Part II. Identification by means of previous recognition, in addition to present identification [CPL 60.30]

(1) In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness who testifies that (a) he or she observed the person claimed by the People to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question, and (c) on a subsequent occasion he or she observed the defendant, or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant, under circumstances consistent with such rights as an accused person may derive under the Constitution of this State or of the United States, and then also recognized him or her (the defendant) or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same

person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he or she (the witness) observed on the first or incriminating occasion, also describe his or her previous recognition of the defendant and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence-in-chief.

Part III. Identification by means of previous recognition, in absence of present identification [CPL 60.25]

(1) In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) Such witness testifies that:

(i) He or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and

(ii) On a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under

the Constitution of this State or of the United States, a person or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first or incriminating occasion; and

(iii) He or she is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(2) Under circumstances prescribed in subdivision one of this section, such witness may testify at the criminal proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such

testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence-in-chief.

Note

Part I is a verbatim reproduction of CPL 60.25 (1) (c), which applies to that section and by a cross-reference to CPL 60.30. At the end of the definition of "blind or blinded procedure," the statute continues as follows:

"The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of this chapter. This article neither limits nor expands subdivision six of section 710.20 of this chapter." (CPL 60.25 [1] [c].)

Part II is a verbatim reproduction of CPL 60.30.

Part III is a verbatim reproduction of CPL 60.25.

Consistent with the constitutional and statutory procedures, a witness may testify to (1) an in-court identification of a defendant that is relevant to the offense charged and that is based on present recollection at the time of the in-court identification and (2) his or her recognition of the defendant made at a relevant time prior to testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant.

If a witness cannot on the basis of present recollection make an in-court identification, consistent with the constitutional and statutory procedures, the witness may testify to his or her identification of the defendant that is relevant to the offense charged and that was made at a relevant time before testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant; provided, there is independent proof that the person viewed personally or by a pictorial, photographic, electronic, filmed or video recorded reproduction was the defendant.

4.25. Evidence of Plea and Ancillary Statements

(1) When a plea of guilty is withdrawn or vacated, evidence of that plea and any statement made in the course of entering that plea:

(a) is not admissible in a criminal proceeding against the person who entered the plea;

(b) is admissible in a civil proceeding against the person who entered the plea, provided that the vacatur was not based upon a violation of due process.

(2) A defendant's statement made on advice of counsel to a prosecutor for the purpose of obtaining a beneficial disposition of the defendant's case is, in the absence of the agreed upon disposition, admissible against the defendant in a subsequent trial, provided the trial is not the consequence of the prosecutor's improper breach of the agreement and provided the parties did not otherwise expressly agree.

Note

Subdivision (1). Subdivision (1) (a) is derived from *People v Spitaleri* (9 NY2d 168 [1961]). In *Spitaleri*, the Court of Appeals held a withdrawn guilty plea is "out of the case forever and for all purposes." (*Id.* at 173.) Thus, once a guilty plea is withdrawn, neither the fact of the plea nor the contents of the plea may be subsequently used at a trial by the prosecuting authority as evidence in chief or to impeach a defendant who testifies. (*People v Moore*, 66 NY2d 1028, 1030 [1985].) As acknowledged by the Court of Appeals, the *Spitaleri* rule is not constitutionally or statutorily compelled and rests upon the principle that "it would be unfair to allow a defendant to withdraw a plea of guilty and then permit its use against him [or her] at trial." (*People v Evans*, 58 NY2d 14, 22 [1982].)

Subdivision (1) (b), as derived from *Cohens v Hess* (92 NY2d 511 [1998]), recognizes that the *Spitaleri* rule does not apply in civil proceedings. Thus, when the vacatur of a defendant's plea is not based upon any violation of due process in the taking of the guilty plea, it is admissible in a civil proceeding. (*Cohens v Hess*, 92 NY2d at 515.)

For the purposes of this rule, a plea of guilty includes an *Alford* plea; that is, a plea entered pursuant to *North Carolina v Alford* (400 US 25 [1970]). In an *Alford* plea, the defendant enters a plea of guilty without admitting factual guilt of the offense but in the face of strong evidence of guilt, often to avoid the consequences of a conviction of a more serious offense. (*Id.* at 472, 475.) The Supreme Court held such a plea is not constitutionally proscribed, and "may generally be used for the same purposes as any other conviction." (*Id.* at 475.) New York recognizes the validity of an *Alford* plea, and the Court of Appeals has held that it has the same consequences as a plea that admits factual guilt. (*See Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000].)

Subdivision (2). Subdivision (2) is derived from *People v Evans* (58 NY2d 14 [1982]) and *People v Curdgel* (83 NY2d 862 [1994]). In both cases, the defendant, in pursuit of a favorable plea agreement and upon the advice and in the presence of counsel, voluntarily furnished the prosecutor with an incriminating statement. In *Evans* the defendant agreed to testify in two trials against an accomplice, and in *Curdgel* the defendant agreed to testify in the grand jury against his accomplices. Before testifying in the grand jury, Curdgel signed a waiver of immunity.

Although for different reasons, each defendant ultimately went to trial—Evans, because his conviction upon his plea was reversed for unrelated reasons; and Curdgel, because he breached the plea agreement by publicly contradicting his testimony. At Evans's trial, the People were permitted to use against him his statements to the prosecutor and his testimony at the accomplice's trials; at Curdgel's trial, the People were permitted to use his grand jury testimony against him.

The plea agreements in *Evans* and *Curdgel* did not include a condition that the statements or testimony would not be admissible at a subsequent trial of the defendant. (*See Curdgel*, 83 NY2d at 864-865 ["As in (Curdgel's) case, the *Evans* defendant . . . set no conditions on the subsequent use of his testimony"].)

In *Evans*, the Court noted that because the defendant entered into an agreement for the exchange of statements or testimony for a beneficial plea that did not include a condition limiting the use of the statements or testimony "when it would have been a simple task to include such a limiting condition as part of that plea, [the defendant] assumed the risk that the challenged evidence might be used against him if he succeeded on his appeal." (*Evans*, 58 NY2d at 23.) In *Curdgel*, the Court noted that "the People bargained for use of defendant's testimony in the prosecution of his accomplices." (*Curdgel*, 83 NY2d at 865.) After the defendant's breach of that agreement, the People were permitted to use the defendant's grand jury testimony at his trial, given in exchange for a beneficial plea offer, "as this was a counseled, foreseeable use of his testimony." (*Id.*)

The statement or testimony in *Evans* and *Curdgel* was bargained for by the People in return for a beneficial plea offer; therefore, when, through no fault of the People, a guilty plea did not result, the People were not precluded from using what they had bargained for against each defendant as this was a "foreseeable" consequence of the plea agreement. (*See People v Melo*, 160 AD2d 600, 600–601 [1st Dept 1990] ["The defendant could have sought as a condition for the negotiations an agreement from the prosecutor not to use his statements against him, but he did not. Absent such agreement with the District Attorney, prepleading admissions made in the presence of the defendant's attorney are admissible" (citation omitted)]; *but cf. People v Thompson*, 108 AD3d 732 [2d Dept 2013].)

4.27. Proof of Previous Conviction; When Allowed [CPL 60.40 (3)]

Subject to the limitations prescribed in [CPL] section 200.60, the people may prove that a defendant has been previously convicted of an offense when the fact of such previous conviction constitutes an element of the offense charged, or proof thereof is otherwise essential to the establishment of a legally sufficient case.

Note

This section restates verbatim CPL 60.40 (3), except for the bracketed reference to the CPL. The statute omits the reference to the CPL.

Under CPL 200.60, if a prior conviction is an element of an offense, a defendant may preclude proof of that conviction if, outside the presence of the jury, the defendant admits the prior conviction.